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1998

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Information
and Privacy
Commissioner/
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Submission to the Standing Committee on Resources Development

Bill 35, Energy Competition Act

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Commissioner
August 1998

1. Access and Privacy

Presently, Ontario Hydro is designated as an institution under the Freedom of Information and Protection of Privacy Act (the Act). This designation ensures that personal information under the custody or control of Ontario Hydro is protected. It also means that individuals seeking information about the operations of Ontario Hydro can submit a request for information and under most circumstances, within 30 days, can receive general information about the operation of Ontario Hydro.

It is the intent of Bill 35 to set up the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation as commercial corporations under the Ontario Business Corporations Act. As such, these new corporations would not automatically be subject to the Freedom of Information and Protection of Privacy Act.

It is appropriate to make the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation subject to the Freedom of Information and Protection of Privacy Act. Ontarians are far better protected if fair and enforceable information standards are set out in statute. The structure and ownership of the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation should not be seen as a bar to making them subject to the Freedom of Information and Protection of Privacy Act. Because a body is independent of government in significant ways does not mean that it must operate outside of the Act. For example, Ontario community colleges, which have academic independence from government, are subject to the Freedom of Information and Protection of Privacy Act. In addition, the Act applies to most quasi-judicial tribunals (such as the Labour Relations Board) even though such tribunals must be, and be seen to be, independent from government in their decision-making.

The Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation are unique. While their corporate structure is that of commercial corporations, they are in most other respects public bodies. The restructuring of Ontario Hydro is not privatization. All the shares of these companies will be owned by the Crown in right of Ontario -- an arrangement more suggestive of a Crown Corporation.

Under the Constitution Act and the federal Income Tax Act, these corporations enjoy the tax-exempt status accorded government property. It is likely that they will remain Crown property for some years to come, as their tax exempt status allows them to make payments in lieu of taxes to write down the multi-billion-dollar debt of Ontario Hydro. In addition, the public has a longstanding, legitimate interest in the environmental, health and safety implications of the generation, transmission and distribution of electricity. This interest is far better served if the public continues to enjoy statutory rights of access to information held by the successors to Ontario Hydro.

Recommendation 1a: The Ontario Electricity Generation Corporation, the Ontario Electric Services Corporation and any other body in the electricity sector that is majority owned by the provincial or a municipal government should be subject to the provincial or the municipal Freedom of Information and Protection of Privacy Acts.

The Ontario Energy Board should have the power to require that participants in the electricity sector which are not subject to Freedom of Information and Protection of Privacy Acts adhere to fair access and privacy standards. These standards could be set out in all licences issued by the Board, thus maintaining a level playing field in the industry.

Recommendation 1b: The Ontario Energy Board Act should be amended by adding the italicized provisions set out below:

> Examples of Conditions
> 69. (2) The conditions of a license may include provisions:
>
> > (l) requiring the licensee to comply with specified requirements relating to access by, and disclosure to, the public of specified categories of information.
> >
> > (m) requiring the licensee to comply with specified requirements relating to the collection, protection, use and disclosure by the licensee of personal information within the meaning of subsection 2(1) of the Freedom of Information and Protection of Privacy Act .

The proposed new clause 69(2)(l) would allow the Board to set standards for licensees regarding the disclosure to requesters or the public at large of information relating to, for example, health, safety and environmental matters. The proposed new clause 69(2)(m) would allow the Board to set standards for licensees regarding fair information practices in the collection, protection, use and disclosure of personal information. For example, the Board could make it a condition in licenses that licensees comply with the Model Code for the Protection of Personal Information of the Canadian Standards Association.

2. Safety Issues -- Disclosure

There are two issues that should be drawn to the attention of the Standing Committee.

2a) Under Section 11 of the Freedom of Information and Protection of Privacy Act, there is an obligation for institutions, of which Ontario Hydro is one, to disclose certain types of information in the public interest.

Specifically, section 11(1) states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

While infrequently used, this section places an onus on institutions to be forthcoming and to inform Ontarians of any grave hazards which may impact on them.

There should be comparable legislation to section 11(1) of the Freedom of Information and Protection of Privacy Act that requires the Ontario Electricity Generation Corporation, the Ontario Electric Services Corporation and comparable corporations to immediately inform the public of any "grave environmental, health or safety hazard to the public." The Ontario Energy Board should be designated as the oversight body in this regard.

Recommendation 2: The Ontario Energy Board Act should be amended by adding the italicized provisions set out below:

> Board objectives, electricity
> 1. The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> > 7. To ensure that information relating to the environmental, health, or safety implications of the generation, transmission and distribution of electricity is publicly available.
>
> Emergency
> 58. (1) Despite this Act, the Board may issue an interim licence authorizing a person to undertake any of the activities described in section 56 if the Board considers it necessary to do so to ensure the safe and reliable supply of electricity to consumers.

The Ontario Energy Board Act should be further amended by adding the section set out below:

> Duty to disclose hazards to the public
> 57.1 (1) A person who owns or operates a distribution system, a transmission system or a generation facility shall, as soon as practicable, disclose any information to the public or persons affected if the person has reasonable and probable grounds to believe that it is in the public interest to do so, and that the information reveals a grave environmental, health or safety hazard to the public.
>
> Duty to disclose possible hazards to the Board
> (2) A person who owns or operates a distribution system, a transmission system or a generation facility shall, as soon as practicable, disclose any information to the Board regarding circumstances which may result in a significant environmental, health or safety hazard to the public.

The Board's duty to disclose hazards to the public
(3) If the Board receives information from any source which, in the opinion of the Board, reveals a significant environmental, health or safety hazard to the public, and concludes on reasonable and probable grounds that it is in the public interest to do so, it shall, as soon as is practicable, disclose that information to the public or persons affected.

Same
(4) The Board is not required to hold a hearing before disclosing information under subsection (3).

Subsection 57.1 (1) imposes an obligation on electrical utilities similar to that imposed on the heads of institutions under s.11 of the Freedom of Information and Protection of Privacy Act. Subsection 57.1 (2) imposes on electrical utilities an obligation to disclose to the Board risks which may be less than grave, but are still significant, if such risks "may" occur. Subsection 57.1 (3) imposes on the Board an obligation to publicly disclose significant risks if the Board concludes it is in the public interest to do so. The Board may obtain the information from a utility under ss.(1) or (2), or from any other source.

2b) One of the underlying purposes of the Freedom of Information and Protection of Privacy Act is to provide a right of access to information under the control of institutions, like Ontario Hydro. This information should be available to the public and necessary exemptions from the right of access should be limited and specific. Further, decisions on the disclosure of government information should be reviewed independently of government.

Many of the requests received by Ontario Hydro deal with important environmental, health, and safety issues. Requesters tend to fall into three groups -- the public, energy awareness groups and the media. Over the last few years, there has been increasing concern about the safety of Ontario's nuclear generating facilities and Ontario Hydro has received requests for information regarding this issue. There have been occasions where Ontario Hydro has refused to disclose information requested, citing exemptions under the Freedom of Information and Protection of Privacy Act. Subsequently the requesters have appealed to the Office of the Information and Privacy Commissioner (the IPC) for a review of the decision to withhold information and in several cases, the IPC has ordered the information disclosed in part or in whole. Here are some examples.

Order Number	Topic of the Order
P-901	Revisions to the Provincial Nuclear Emergency Plan and the recommendations of the Working Group on the subject of emergency planning.
P-1190	Records relating to peer evaluation reports conducted by or for Ontario Hydro for each of the five nuclear plants operated by Ontario Hydro.
P-1231	Correspondence between Ontario Hydro and Atomic Energy of Canada Limited regarding the Technical Advisory Committee environmental impact statement.
P-1562	A three-page chart regarding levels of tritium at the Bruce Nuclear Power Development Used Fuel Dry Storage Project site.
P-1574	Records relating to a report entitled "Metal Discharges from the Ontario Hydro Pickering Nuclear Generating Station - Report of an Expert Panel."
P-1597	Records relating to deuterium ingress in Hydro CANDU nuclear reactors due to corrosion of pressure tubes.

Order P-1190, which was issued on May 27, 1996, is particularly significant. The requester, a newspaper reporter, asked for a copy of all peer evaluation reports conducted by or for Ontario Hydro. This request was clarified to be the most recent peer evaluation report for each of the five nuclear plants operated by Ontario Hydro. Ontario Hydro denied access to all reports. While the IPC found that the records did qualify for exemption under section 18(1)(c) -- economic and other interests of the institution -- it ordered that the peer evaluation reports be disclosed as the IPC believed that the public interest in nuclear safety, in this situation, outweighed the purpose of the section 18(1)(c) exemption. Ontario Hydro applied for Judicial Review of this order. Ontario Hydro's application was dismissed. On February 24, 1997, Ontario Hydro's motion for leave to appeal was refused.

In Order P-1190, Assistant Commissioner Tom Mitchinson stated:

> It is clear that public concerns regarding the safety of nuclear facilities was the impetus behind the creation of Hydro's Peer Evaluation Program. In my view, it is not possible to allay these concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standards. This simply does

not provide enough information for the public to assess the adequacy of the program in meeting its objectives. I am unable to accept Hydro's position that the results of the Peer Evaluation Program should not be disclosed to the very public whose concerns about nuclear safety the Program was designed to allay.

Further in Order P-1190, Assistant Commissioner Tom Mitchinson quoted from Order P-270 in which former Commissioner Tom Wright stated:

> In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
>
> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.

The Standing Committee is strongly urged to consider the disclosure issues that will need to be addressed if the Ontario Electricity Generation Corporation, the Ontario Electric Services Corporation and comparable corporations are not subject to the Freedom of Information and Protection of Privacy Act.

Unless access rights are conferred in statute, the public, energy awareness groups and the media can not be assured that they will be granted access to this information.

Recommendations 1a and 1b noted above will help achieve this.

3. Protection of Personal Information

During the course of its operation, Ontario Hydro has been responsible for the care and custody of the personal information of its employees, customers and other individuals.

If the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation will not be subject to the Freedom of Information and Protection of Privacy Act, the privacy protection allotted to individuals will be lost.

To compensate for this loss, the IPC prefers that the privacy of individuals be protected by an amendment to Bill 35 or by inclusion in another piece of legislation. This could be done by including in the legislation provisions similar to those in the Freedom of Information and Protection of Privacy Act (Sections 41 - 49). The oversight body, to ensure these provisions were being adhered to, could be the Ontario Energy Board. It is subject to the Freedom of Information and Protection of Privacy Act and therefore is familiar with it.

If this suggestion is not adopted, our recommendation 1b noted above, will help ensure that the privacy rights afforded Ontarians will be preserved. Privacy protection issues can also be incorporated in the regulations that will be developed in conjunction with Bill 35.

In past privatization initiatives, the government has contracted with the private sector body to protect privacy rights. Similarly, the government could contract with the successors of Ontario Hydro to continue to observe fair information practices. The IPC refers the Standing Committee to the paper published by our office entitled "Model Access and Privacy Agreement". A copy is enclosed. This is far better than having no standards in place. However, it is a less effective solution than the recommendations set out above because i) individual Ontarians are not party to the contract; and ii) the government may have no contractual relations at all with the competitors that may enter the electricity market in the future.

At a minimum, it is recommended that the Ontario Electricity Generation Corporation, the Ontario Electric Services Corporation and any other comparable corporations, like many other corporations in Ontario, follow the Canadian Standards Association Standard Model Code for the Protection of Personal Information, which is based on "fair information practices." The standard is a voluntary national standard for the protection of personal information. The standard addresses two broad issues: the way organizations collect, use, disclose and protect personal information; and the right of individuals to have access to personal information about themselves, and if necessary, to have the information corrected. The standard has been approved as a National Standard of Canada by the Standards Council of Canada. Enclosed is a copy.

Recommendation 3: Should recommendations 1a and 1b not be adopted, then the Ontario Electricity Generation Corporation, the Ontario Electric Services Corporation and other comparable corporations contracting with the government should be required by contract to ensure the privacy, confidentiality and security of personal information transferred from Ontario Hydro or collected

directly from individuals. They should be required to protect the personal information in the same manner as Ontario Hydro did under the Freedom of Information and Protection of Privacy Act.

4. Independent Electricity Market Operator, the Market Surveillance Panel and the Ontario Hydro Financial Corporation

It is our understanding, from staff discussions with the Ministry of Energy, Science and Technology, that the Independent Electricity Market Operator, the Market Surveillance Panel and the Ontario Hydro Financial Corporation will be subject to Freedom of Information and Protection of Privacy Act. On reading the Bill, it is not clear how this will occur.

Recommendation 4: The Independent Electricity Market Operator, the Market Surveillance Panel and Ontario Hydro Financial Corporation should be designated as institutions subject to the Freedom of Information and Protection of Privacy Act and be listed under its regulations.